IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of: MICHELL LE VOSHELL Petitioner, and ARLEN WILLIAM VOSHELL, Respondent, v. BAUM, ETENGOFF, & BUCKLEY and MARK F. BAUM, Appellant/Lien Claimants	No. 32968-9-II UNPUBLISHED OPINION

PENOYAR, J. — Mark Baum filed an attorney lien against the real property his client was awarded in a marital dissolution proceeding. The trial court set aside the lien, finding that Baum was not entitled to an attorney lien on real property. Baum now appeals. We affirm.

FACTS

Mark Baum of the law firm Baum, Etengoff & Buckley represented Arlen Voshell (Voshell) in divorce proceedings against his wife, Michell Voshell (Michell)[1]. The trial court's final orders included a $90,000 judgment for Michell plus child support and spousal maintenance. Voshell received ownership of an apartment building in Battle Ground and the family home in Ridgefield.

Due to a breakdown in the attorney-client relationship between Baum and Voshell, Baum moved the trial court under chapter 2.44 RCW to permit his withdrawal and to establish a judgment against Voshell for the $14,755.42 in attorney fees Voshell owed. On May 25, 2004, the same day he filed his motion, Baum filed a notice of attorney lien with the Clark County Superior Court and recorded his notice of lien with the Clark County Auditor. The notice of lien said:

> Pursuant to RCW 60.40 et seq., notice is given that Baum, Etengoff & Buckley and Mark F. Baum have and claim a lien upon the papers of Arlen William Voshell that have come into the possession of Baum, Etengoff & Buckley and Mark F. Baum in the course of their professional employment, upon any money in possession of the claimants, upon money in the hands of the adverse party, to-wit, Michell Le Voshell, in an action or proceeding, in which the claimants were employed, from the time of giving notice of the lien to that party and upon a judgment to the extent of the value of any services performed by the claimants in the action.
> The amount claimed is $14,755.42.
> Notice is given that Baum, Etengoff & Buckley and Mark F. Baum have an attorney lien for and on account of labor, skills and services expended on behalf of:
> Arlen Voshell
> 2117 NE 256th Circle
> Ridgefield, WA 98642

[1] To avoid confusion, we refer to this party by her first name. We mean no disrespect.

Clerk's Papers (CP) at 5-6. On June 8, 2004, the court authorized Baum's withdrawal but reserved on granting a judgment. The court order said, "Counsel may re-approach the court to establish a judgment for fees and costs past due." CP at 11.

After entering the decree of dissolution for the Voshells, the court re-heard the issue of attorney fees and found that Baum was not entitled to a judgment for fees at that time.

When Voshell attempted to sell the apartment building in order to satisfy Michell's $90,000 judgment, he learned from the title report that Baum's attorney lien was listed as a claim against the property. Voshell moved the court for an order removing Baum's attorney lien and for sanctions against Baum for filing the lien. The trial court ordered that Baum's attorney lien be removed from Voshell's real property and that any judgment against Voshell as a result of Baum's attorney lien be vacated. Baum appeals this decision.

ANALYSIS

I. Failure to seek an order of discretionary review

Voshell moves this court to dismiss this appeal because Baum filed it as a notice of appeal instead of as a notice for discretionary review. He claims that RAP 17.4(d) allows him to raise this issue in his brief because, if granted, it would preclude hearing the case on the merits. RAP 17.4(d).[2] He argues that Baum's claim is collateral to his dissolution case, and because the order Baum appeals was not a final judgment, Baum should have filed a motion for discretionary review under RAP 2.3.

We believe Baum's appeal is proper. The order from which Baum appeals was effectively

[2] "A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits." RAP 17.4(d).

a final order as to his attorney lien. Under RAP 5.1(c),[3] even if Baum mischaracterized his notice to this court, the notice will have the same effect as a proper notice.

II. Attorney lien statute

Baum's appeal involves interpreting the attorney lien statute, RCW 60.40.010,[4] which gives an attorney an automatic lien for his compensation on the client's papers, on the client's money in the attorney's hands, and on the client's recovery from another party. RCW 60.40.010(1). The attorney lien statute only gives the attorney a lien on money from an action when the client *receives* a judgment in his favor. *See Wilson v. Henkle*, 45 Wn. App. 162, 170, 724 P.2d 1069 (1986); *Suleiman v. Cantino*, 33 Wn. App. 602, 606-07, 656 P.2d 1122 (1983). An attorney has no interest in money his client must pay to another party. *See Suleiman*, 33 Wn. App. at 606-07.

In order to obtain a lien on a judgment awarded to a client, an attorney must file a notice of lien with the clerk of the court in which the judgment is entered. RCW 60.40.010(1)(e). The notice of lien must be filed with the papers in the action in which the judgment was rendered and an entry should be made in the execution docket showing the attorney's name, the amount claimed, and the date of filing notice. RCW 60.40.010(1)(e).

An attorney may effectively file a lien on a judgment even before a judgment for the client is entered. RCW 60.40.010(1)(c); *Jones v. Int'l Land Corp.*, 51 Wn. App. 737, 740, 755 P.2d

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[3] "A notice of appeal of a decision which is not appealable will be given the same effect as a notice for discretionary review." RAP 5.1(c).

[4] RCW 60.40.010 was recently amended with the changes effective June 10, 2004, shortly after Baum filed his lien. The legislature said that it intended the changes to apply retroactively (except for RCW 60.40.010(4), a provision that is not at issue in this case). Laws of 2004, ch. 73 § 1. Therefore, we will cite to the current statute unless we indicate otherwise.

184 (1988). An attorney does this by giving written notice to the adverse party that the attorney has a lien on funds in the adverse party's hands and the funds comprise the subject matter of the action. RCW 60.40.010(1)(c); *Jones*, 51 Wn. App. at 742. The attorney then has a lien on any judgment that the adverse party must pay the attorney's client. *See* RCW 60.40.010(1)(c), (e); *Suleiman*, 33 Wn. App. at 606-07.

III. Prohibition on attorney liens on real property

The Washington Supreme Court has held that, for policy reasons, an attorney may not obtain an attorney lien on real property.[5] *Ross v. Scannell*, 97 Wn.2d 598, 606-07, 647 P.2d 1004 (1982). In *Ross*, the attorney represented the buyer in a suit against the sellers for specific performance of a real estate sale agreement. *Ross*, 97 Wn.2d at 600. With the attorney's help, the client successfully obtained title to the disputed real property. *Ross*, 97 Wn.2d at 601. However, the attorney also had an interest in the transaction and wanted a percentage of any profits from the subsequent sale of the real property. *Ross*, 97 Wn.2d at 600-01. The attorney filed a claim of attorney's lien that included the legal description of the real property. *Ross*, 97 Wn.2d at 602-03. He did so with the admitted purpose of clouding title to the property. *Ross*, 97 Wn.2d at 603.

The trial court approved the attorney lien on real property but the Washington Supreme Court disagreed. *Ross*, 97 Wn.2d at 603, 605. The court was concerned that an attorney lien clouded the title to real property and gave an attorney unfair leverage against a client.[6] *Ross*, 97

[5] An attorney, as a creditor, may still sue a client, obtain a judgment, and then record a judgment lien against the client's real property. *Ross v. Scannell*, 97 Wn.2d 598, 605, 647 P.2d 1004 (1982).

[6] In light of this authority, Voshell argues that Baum committed fraud and professional

Wn.2d at 606.

The holding of *Ross* also prevents attorney liens on the proceeds of real property sales, since both filings appear as liens on a title report and cloud the client's title. *In re the Disciplinary Proceedings Against VanDerbeek*, 153 Wn.2d 64, 88, 101 P.3d 88 (2004).

IV. Prejudgment attorney liens and priority

Baum claims that because he filed his attorney lien before judgment, he has rights to funds held by *both* Arlen and Michell Voshell and any proceeds from the sale of marital assets to third parties. He also claims that, because he filed his lien before judgment, he has priority over other lien claimants.

Baum was entitled to file a prejudgment lien but he is only entitled to a lien on *his client's* award.[7] *See Jones*, 51 Wn. App. at 742; *Wilson*, 45 Wn. App. at 170; *Suleiman*, 33 Wn. App. at 606-07. He does not have any claim on funds in Michell's hands unless they are funds she has to pay his client in judgment.[8] RCW 60.40.010(1)(c), (e); *Suleiman*, 33 Wn. App. at 606-07.

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misconduct by filing an attorney lien against his real property. Baum does not address this accusation directly but insists that his actions were consistent with the law. Because Voshell did not sue on a fraud or malpractice claim, we will not address any potential ethical issues.

[7] The recent amendments give attorneys the same right and power over actions to enforce their liens as the clients have for the amount due to them. RCW 60.40.010(2).

[8] We leave for another day the question of whether the attorney lien statute even applies to judgments awarded in a dissolution case. We note that other jurisdictions have held that divorce proceedings do not create proceeds to which attorney liens may attach. *Theroux v. Theroux*, 536 N.Y.S.2d 151, 153-54 (1988) (the divorce settlement did not create proceeds because it only converted the wife's interest in real property into dollars). This is consistent with the rule, adopted in other jurisdictions, that an attorney does not have a lien where the litigation only preserves a client's interest or title but does not create any proceeds. *E.g., Desmond v. Socha*, 327 N.Y.S.2d 178, 180-81 (1971), *aff'd*, 337 N.Y.S. 2d 261 (1972).

Theoretically, Baum could have given Michell notice that he had a lien in any monetary judgment she would have to pay to Voshell. *See Jones*, 51 Wn. App. at 740. Then, even before the statutory amendments, Baum would have had priority over Voshell and any other creditors who filed liens on Voshell's proceeds from the lawsuit. RCW 60.40.010 (3), (4) (2003); *see State v. A.N.W. Seed Corp.*, 54 Wn. App. 729, 733, 776 P.2d 143 (1989) (finding creditor's garnishment prevailed over attorney's lien because it was "first in time"); *Wilson*, 45 Wn. App. at 170.

In the recent amendments, the legislature gave attorney liens priority over *all* other liens. RCW 60.40.010(3). Since subsection (3) is retroactive, Baum had priority in any monetary judgment Voshell received. However, because Voshell's judgment awarded him real property, Baum may not claim a lien on it.

V. Proceeds of the judgment

Baum is claiming a lien in the "proceeds" of the sale of the apartment building. Appellant's Br. at 15-16. He distinguishes his case from *Ross* and *VanDerbeek* by saying that he is not claiming an interest in the building itself. He also claims that he never filed the lien against the property because his attorney lien notice did not give a legal description of the real property. He argues that the rule from *Jones* allowing pre-judgment liens also gives him priority in the proceeds from the sale of real property. He claims that recent changes in the attorney lien statute support his position.

We do not believe that this case differs significantly from *VanDerbeek*.[9] *VanDerbeek*

[9] *VanDerbeek* was filed November 24, 2004, several months after Baum filed his notice of attorney lien.

explicitly prevents attorney liens from attaching to the proceeds from the sale of real property. *VanDerbeek*, 153 Wn.2d at 88. Because *VanDerbeek* was decided after the recent amendments took effect, Baum cannot argue that the statutory amendments changed the rule.[10]

Baum is correct that *Ross* and *VanDerbeek* produce unsettling results from a policy perspective. If, instead of a building, Voshell had been awarded the couple's bank account, *Ross* and *VanDerbeek* do not prevent Baum from obtaining a lien on those funds (assuming, without deciding, that dissolution-related judgments are fair game for attorney liens). The only thing preventing Baum's lien in this case is Washington's common law rule that an attorney has no lien if the recovery his client obtains is real property. However problematic *Ross's* rule is, the Washington Supreme Court created it and recently reasserted it in *VanDerbeek*. While Baum has vigorously argued for a modification or reversal of this precedent, it controls and we cannot overrule it.

VI. Equal protection

Baum claims that our Supreme Court's interpretation of the attorney lien statute denies attorneys equal protection because attorneys do not have the same right to attach liens to real property as other workers do. Baum claims that our Supreme Court's interpretation makes attorneys a suspect class and treats them differently from other similarly situated workers. Baum

[10] Although the current statute at section (1)(d) specifically allows a lien "[u]pon an action . . . and its proceeds," the statute also states that:

> For the purposes of this section, "proceeds" means any monetary sum received in the action. Once proceeds come into the possession of a client, such as through payment by an opposing party or another person or by distribution from the attorney's trust account or registry of the court, the term "proceeds" is limited to identifiable cash proceeds determined in accordance with RCW 62A.9A-315(b)(2).

RCW 60.40.010(5). This shows that the legislature only intended the lien to attach to cash proceeds from the action and not to the proceeds from the sale of property.

claims that our Supreme Court had no rational basis for denying attorney liens on real property.

Baum raises his equal protection claim for the first time on appeal. We may still review the claim if it addresses a manifest error affecting a constitutional right. RAP 2.5(a)(3).

The proper approach in analyzing alleged constitutional error raised for the first time on appeal involves four steps: (1) we must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue; (2) we must determine whether the alleged error is manifest; (3) if we find the alleged error to be manifest, then we must address the merits of the constitutional issue; and (4) if we determine that an error of constitutional import was committed, then, and only then, can we undertake a harmless error analysis. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). We hold that Baum has not met the first prong of the test because he has not shown a constitutional issue.

An attorney always has the option of suing a client for unpaid fees. *Ross*, 97 Wn.2d at 605. A handful of professions, including attorneys, may assert liens to assure payment without initiating a lawsuit to recover unpaid fees. *E.g.*, RCW 60.04.021 (contractor's lien on the improvement to real property); RCW 60.24.033 (lien on real property for labor or services on timber and lumber); RCW 60.44.010 (medical service providers' lien on a patient's recovery from a tortfeasor). The attorney lien statute allows the attorney to claim a lien in the client's recovery from another party. RCW 60.40.010. Simply because the legislature has granted some professions the opportunity to assert liens does not mean that it has unconstitutionally discriminated against all other professions.

The legislature has tailored the liens to the type of service performed. Doctors cannot obtain a lien on a patient's real property, only on a patient's recovery from a tortfeasor. RCW 60.44.010. Similarly, the attorney lien statute

limits an attorney to a lien in the judgment the attorney helped the client win. RCW 60.40.010. Therefore, our Supreme Court's interpretation preventing the attorney lien from attaching to real property is not an unconstitutional application of the lien statute.

VII. Attorney fees

Both parties request attorney fees on appeal. Baum claims that his retainer agreement with Voshell allows him to recover fees if it is necessary for him "to expend any time or to initiate any action to collect any sum owing." App. Br. at 37. He claims that this is an action on a contract and so the contract entitles him to attorney fees.

We agree that because this action arose out of Baum's attempts to collect his attorney fees under the retainer agreement, this is an action on a contract. *See Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n,* 116 Wn.2d 398, 413, 804 P.2d 1263 (1991). Where a contract specifically provides for an award of attorney fees that are incurred to enforce its provisions, the prevailing party shall be entitled to reasonable attorney fees regardless whether it is the party specified in the contract. RCW 4.84.330. Because we affirm the trial court's decision in

Voshell's favor, he is the prevailing party and is entitled to attorney fees on appeal under the retainer agreement.

Affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We Concur:

Houghton, P.J.

Bridgewater, J.